

EXHIBIT A

VICK LAW GROUP, APC
Scott Vick (No. 171944)
Lital Gilboa (No. 263372)
800 West Sixth Street, Suite 1220
Los Angeles, California 90017
Telephone: (213) 784-6225
Facsimile: (213) 985-7155
Scott@vicklawgroup.com
Lital@vicklawgroup.com

Attorneys for Defendant
ANDREW TRADER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

ALPHA INVESTMENT, LLC,

Plaintiff,

v.

ZYNGA INC. and ANDREW TRADER,

Defendants.

Case No. CV 11-3500-JSW

**[PROPOSED] NOTICE OF MOTION
AND MOTION TO DISMISS FIRST
CAUSE OF ACTION OF THE
COMPLAINT FOR PURPORTED
MANDATORY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF.**

Date: October 14, 2011
Time: 9:00 a.m.
Location: Courtroom 11

NOTICE OF MOTION AND MOTION TO INTERVENE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Andrew Trader (“Mr. Trader”) will and hereby does move this Court pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6) for an order dismissing with prejudice the First Cause Of Action in the Complaint for purported Mandatory Injunction. This Motion shall be brought for hearing before the Honorable Jeffrey S. White, United States District Court for the Northern District Of California (San Francisco Division), San Francisco Courthouse, Courtroom 11, 19th Floor, 450 Golden Gate Avenue, San Francisco, California 94102 on October 14, 2011 at 9:00 a.m.

Mr. Trader’s Motion to Dismiss the first cause of action in the Complaint for purported mandatory injunction is brought pursuant to Rule 12(b)(6) on the grounds that the Complaint fails to state a claim upon which relief can be granted.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Request for Judicial Notice and accompanying exhibits filed therewith, the Declaration of Scott Vick, argument of counsel, on all the pleadings and papers of record in this matter, and on such other matters as the Court may properly consider on this motion.

DATED: August 5, 2011

VICK LAW GROUP, APC

By: /s/ Scott Vick

VICK LAW GROUP, APC

Scott Vick (No. 171944)

Lital Gilboa (No. 263372)

Attorneys for Defendant

ANDREW TRADER

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's First Cause of Action purports to assert a claim against Defendant Zynga, Inc. ("Zynga") for "Mandatory Injunction," upon which Plaintiff seeks a court order mandating that Zynga: (1) accept the legal opinion provided to Zynga by Defendant Andrew Trader ("Mr. Trader") in connection with the proposed sale of Zynga stock to Plaintiff by Mr. Trader; (b) register Mr. Trader's shares in Alpha's corporate name; and (c) issue and deliver to Alpha a duly executed stock certificate evidencing the shares in Alpha's corporate name. (Compl. ¶¶ 7, 79-80; and prayer for relief (c)). Although Plaintiff nominally asserts the claim only against Zynga, but not Defendant Andrew Trader ("Mr. Trader"), the requested relief could not be issued without requiring that Mr. Trader re-tender his shares in direct contravention of the agreements that govern the transaction. For this reason, Mr. Trader seeks to intervene as a defendant to the First Cause of Action and seek its dismissal.

Plaintiff's so-called "Mandatory Injunction" claim is riddled with defects that require its dismissal with prejudice. To begin with, it is well settled under California law,¹ that an injunction is a remedy, not a cognizable cause of action. For this reason alone, Plaintiff's first cause of action must be dismissed. And, because there is no way Plaintiff can cure this particular deficiency, the Court should dismiss Plaintiff's First Cause of Action for a Mandatory Injunction with prejudice.

But Plaintiff's "Mandatory Injunction" cause of action fails for another reason. Even if a cause of action for a "mandatory injunction" was cognizable under California law (and it is not), no injunction could issue because Plaintiff has an adequate remedy at law on the face of the Complaint. Specifically, Plaintiff alleges that: (1) it contracted to buy one million shares of Zynga stock for \$12.87 per share (Compl. ¶ 1); (2) the proposed transaction was wrongfully scuttled (Compl. ¶ 77); and (3) since then the value of the shares has increased (Compl. ¶ 67). Even if Plaintiff were entitled to relief (and it is not), calculating monetary damages based on the facts alleged in the Complaint is

¹ The parties agreed to be bound by California law under all of the operative agreements governing this dispute. See RJN Ex. A (SPA ¶ 7.2); Ex. B (Stock Option Agreement ¶ 16); Ex. C (Exercise Agreement ¶ 16).

1 a strait-forward mathematical exercise of the difference between \$12.87 and the value of the shares.
 2 Under California law, Plaintiff has no right to seek injunctive relief because on the face of the
 3 Complaint “pecuniary compensation would ... afford adequate relief.” Cal. Civ. Code § 3422.

4 In addition to the insurmountable obstacles described above, there is another. An injunction
 5 would contravene, and seek to re-write, the binding terms of the parties’ agreement. Under the terms
 6 of the Stock Purchase Agreement (“SPA”), Plaintiff “acknowledge[d]” and “agree[d]” it “is bound”
 7 by the terms of a Stock Option Agreement and an Exercise Agreement. *See* RJN Ex. A (SPA ¶¶ 5.1
 8 and 5.2), Ex. C (Stock Option Agreement); Ex. D (Exercise Agreement). In the Exercise
 9 Agreement, Plaintiff agreed that the proposed transaction had to be consummated, if at all, within
 10 120 days of the date that Zynga was provided with Notice (as that term is defined in the agreement)
 11 of the proposed transaction. Once the 120-day window closed, Mr. Trader’s stock could not be
 12 transferred. Plaintiff agreed to restrictions in the Exercise Agreement providing that, in order for
 13 Mr. Trader’s stock to be transferred after expiration of this 120-day window, a *new Notice* would
 14 have to be issued under which Mr. Trader would have to make a new agreement to re-tender his
 15 shares. Thereafter, Zynga would have a right of first refusal. Plaintiff concedes that the
 16 contemplated transaction was not consummated within the required 120-day window, thereby
 17 precluding the transfer of Mr. Trader’s stock. Moreover Plaintiff fails to allege that any new Notice
 18 was issued, that Mr. Trader agreed to re-tender his stock, or that Zynga declined to exercise its right
 19 of first refusal. Plaintiff is not entitled to end-run around these contractual provisions to which it
 20 agreed by seeking an injunction.

21 Plaintiff’s First Cause of Action for a Mandatory Injunction fails as a matter of law and as a
 22 pleading matter. Because the defects cannot be cured, it should be dismissed with prejudice.

23 **II. BACKGROUND**

24 **A. The Restrictions On Mr. Trader’s Stock**

25 Andrew Trader is a former employee of Defendant Zynga, Inc. (“Zynga”), a company that,
 26 among other things, develops and markets games such as FarmVille, CityVille and Mafia Wars that
 27 are used on social networking websites such as Facebook and MySpace. Compl. ¶¶ 19, 24. During
 28

1 his employment at Zynga, Mr. Trader received Zynga stock pursuant to the terms of a Stock Option
 2 Agreement (“Stock Option Agreement”) and Stock Option Exercise Agreement (“Exercise
 3 Agreement”). Compl. ¶¶ 19, 22, 24.

4 Because Zynga is not a publicly traded company and the Zynga stock Mr. Trader owns has
 5 never been registered with the Securities and Exchange Commission (“SEC”), Mr. Trader’s Zynga
 6 stock is not freely transferable and is subject to strict federal and state securities laws. Under federal
 7 and state securities laws, Mr. Trader’s stock can only be transferred, *inter alia*, if a sale is “qualified”
 8 and subject to an exemption from SEC registration requirements. In other words, Mr. Trader could
 9 not transfer his stock, nor could Zynga provide the required consent, if the transfer would violate
 10 federal or state securities laws.

11 **B. Plaintiff and Defendant Andrew Trader Executed The Stock Purchase**
 12 **Agreement (“SPA”) And Representation Letter For The Sale Of Zynga Stock**

13 After Mr. Trader left Zynga, he endeavored to sell some of his Zynga stock. In the Summer
 14 of 2010, a corporate intermediary called SecondMarket, Inc. (“SecondMarket”) introduced Plaintiff,
 15 a prospective buyer, to Mr. Trader. Compl. ¶¶ 26-27.

16 With SecondMarket’s assistance, Mr. Trader and Plaintiff entered into a Stock Purchase
 17 Agreement on August 26, 2010 whereby Mr. Trader agreed to sell one million shares of Zynga
 18 common stock to Plaintiff, subject to certain terms and conditions, for approximately \$12.8 million.
 19 Compl. ¶ 28.

20 Zynga did not approve of this August 26, 2010 agreement, and insisted that the parties use
 21 Zynga’s own form of agreement. The parties complied with that request. On November 23, 2010,
 22 Plaintiff and Mr. Trader entered into a new Stock Purchase Agreement (“SPA”) in exactly the form
 23 required by Zynga. The SPA contained an integration clause (SPA ¶ 7.4) that superseded the prior
 24 agreement. Compl. ¶¶ 22, 50. Plaintiff and Mr. Trader simultaneously executed a Representation
 25 Letter substantially in the form that Zynga had requested, although Plaintiff refused to consent to and
 26 deleted one of the terms that Zynga had insisted be included in the document. Compl. ¶ 50.

27 **C. Plaintiff Acknowledged And Agreed That Plaintiff “Is Bound” By The Terms Of**
 28

The Stock Option And Exercise Agreements

Mr. Trader's stock was subject to numerous restrictions and limitations set forth in a Stock Option Agreement and an Exercise Agreement. In paragraphs 5.1 and 5.2 of the SPA, Plaintiff "acknowledge[d]" and "agree[d]" that *Plaintiff "is bound by" the terms of the Binding Stockholder Agreements*. RJN Ex. A (emphasis added). In the Representation Letter executed by Plaintiff, it agreed that the "*Binding Stockholder Agreements*" included the *Stock Option Agreement* and the *Exercise Agreement*. RJN Ex. B. (emphasis added). Specifically, SPA ¶¶ 5.1 and 5.2 state:

5.1 Binding Stockholder Agreements. [Plaintiff] acknowledges and agrees that it *is bound by*, and the Shares will be subject to, the terms of *the Binding Stockholder Agreements* applicable to subsequent purchasers of the Shares.

5.2 Representation Letter. [Plaintiff] acknowledges and agrees that it *is bound by*, and the Shares will be subject to, the provisions of the *Representation Letter*.

Id. (emphasis added); *see also* Representation Letter, RJN Ex. B (stating that "Binding Stockholder Agreements" include the "Stock Option Agreement" and "Stock Option Exercise Agreement").

Although the Stock Option Agreement and Exercise Agreement are integral to and deemed part of the contract between Plaintiff and Mr. Trader for purposes of this Motion to Dismiss,² in violation of federal pleading requirements, Plaintiff conspicuously fails to attach them to its Complaint or to allege the terms in them that completely undercut Plaintiff's claims.

D. Plaintiff Agreed That The Proposed Transaction Would Expire 120 Days After The Notice Was Given To Zynga

In the Exercise Agreement, Plaintiff agreed that the proposed transaction had to be consummated, if at all, within 120 days from the date that Notice³ of the proposed transaction was provided to Zynga. Specifically, Paragraph 9.5 of the Exercise Agreement provides:

² *Williams Constr. Co. v. Standard-Pacific Corp.*, 254 Cal. App. 2d 442, 454 (1967) ("a secondary document becomes part of a contract as though recited verbatim when it is incorporated into the contract by reference, provided that the terms of the incorporated document are readily available to the other party.").

³ The "Notice" was required include specific information about the proposed transaction set forth in Exercise Agreement 9.1.

9.5 Holder's Right to Transfer. If all of the Offered Shares proposed in the Notice to be transferred to a given Proposed Transferee are not purchased by the Company . . . then ***the Holder may sell or otherwise transfer such Offered Shares*** to each Proposed Transferee at the Offered Price or at a higher price, ***provided that (i) such sale or other transfer is consummated within 120 days after the date of the Notice.***

E. Plaintiff Further Agreed That If The Transaction Was Not Consummated Within The 120-Day Window, Any Subsequent Transfer Would Require A New Notice And A New Agreement By Mr. Trader To Re-Tender His Shares

In the Exercise Agreement, Plaintiff also agreed that if the transaction was not consummated within this 120-day period, no subsequent transfer of shares could occur unless “*a new Notice*” was given to Zynga giving it a right to exercise a new right of first refusal:

If the Offered Shares described in the Notice ***are not transferred to each Proposed Transferee within such 120 day period, then a new Notice must be given*** to the Company pursuant to which the Company will again be offered the Right of First Refusal before any Shares held by the Holder may be sold or otherwise transferred. See RJN, Ex. D (Exercise Agreement ¶ 9.5) (emphasis added).

More importantly from Mr. Trader’s perspective, in order for a “new Notice” to be given, Mr. Trader would have to agree to re-tender his shares, and come to an agreement with Plaintiff as to the number of shares to be sold and the price to be paid for them. Specifically, Paragraph 9.1 of the Exercise Agreement provides:

9.1 Notice of Proposed Transfer. The Holder of the Offered Shares will deliver to the Company a written notice (the “*Notice*”) stating: (i) ***the Holder's bona fide intention to sell*** or otherwise transfer the Offered Shares; (ii) the name and address of each proposed . . . transferee (the “Proposed Transferee”); (iii) the number of Offered Shares to be transferred . . . ; (iv) the bona fide cash price or other consideration for which the Holder proposes to transfer the Offered Shares. . . ; and (v) that the Holder acknowledges this Notice is an offer to sell the Offered Shares to the Company and/or its assignee(s) pursuant to the Company's Right of First Refusal at the Offered Price as provided for in this Exercise Agreement. See RJN, Ex. D (Exercise Agreement ¶ 9.1) (emphasis added).

F. Serious Questions Arise As To Whether SecondMarket’s Internet Advertising Violated California Securities Laws, And That Taint Scuttles The Transaction

1 Although Plaintiff bemoans that Zynga refused to consent to the transfer of stock, it bears
 2 emphasizing that Zynga can be held individually liable (both civilly and criminally) for, *inter alia*,
 3 aiding and abetting violations of the securities laws, if Zynga were to knowingly facilitate the
 4 transfer of unregistered Zynga stock from one person to another (*e.g.*, by changing the registered
 5 owner of the stock or issuing or delivering new stock certificates in the name of a different party) in
 6 the absence of a exemption permitting the transfer.

7 Due to this potential liability, companies like Zynga will refuse to consent to a transfer,
 8 unless they obtain a satisfactory legal opinion that the proposed transaction does not violate the
 9 federal or state securities laws. And, if during the course of a proposed transaction, Zynga becomes
 10 aware of facts that raise serious questions about whether the transaction violates the federal or state
 11 securities laws, Zynga is not required to provide its consent.

12 Here, Plaintiff alleges that the intermediary (SecondMarket) that facilitated the transaction
 13 between Plaintiff and Mr. Trader operated an “online marketplace.” Compl. 26. Nowhere in the
 14 Complaint, however, does Plaintiff address how SecondMarket’s “online marketplace” ran headlong
 15 into the California securities laws prohibition of intermediaries like SecondMarket advertising on the
 16 internet, and how that SecondMarket taint scuttled the transaction. While it is understandable that
 17 Plaintiff avoids discussing the SecondMarket taint, Plaintiff’s First Cause of Action fails regardless.

18 **G. Since The Expiration Of The 120-Day Window, No Notice Has Been Given And**
 19 **Mr. Trader Has Not Agreed To Re-Tender His Shares**

20 Plaintiff alleges that Notice of the transaction, which triggers the 120-day clock, was
 21 provided to Zynga on August 26, 2010. Compl. ¶¶ 32-34 (“On or about August 26, 2010, Trader
 22 provided Zynga . . . with a Notice”). Plaintiff concedes that the transaction was not consummated
 23 (Compl. ¶ 77). Thus, the 120-day window closed on December 24, 2010.

24 Plaintiff agreed that no transfer of shares could occur after the 120-day window closed unless
 25 a “*new Notice*” was provided to Zynga. Plaintiff fails to allege that the required “new Notice” was
 26 provided to Zynga. *See* RJN Ex. D (Exercise Agreement ¶ 9.1). Furthermore, a new Notice would
 27 require that Mr. Trader agree, among other things, to re-tender his shares. Plaintiff also fails to
 28

1 allege that Mr. Trader agreed to re-tender his shares. Plaintiff cannot end-run around these
 2 contractual requirements by seeking an injunction that could cloud title to Mr. Trader's shares.

3 **III. PLAINTIFF'S FIRST CAUSE OF ACTION FOR "MANDATORY INJUNCTION"**
 4 **FAILS TO STATE A CLAIM AND MUST BE DISMISSED**

5 Plaintiff's First Cause of Action purports to assert a claim for a "Mandatory Injunction,"
 6 upon which Plaintiff seeks an order mandating that Zynga:

- 7 ● Accept the legal opinion provided to Zynga by Trader;
- 8 ● Register Mr. Trader's shares in Alpha's corporate name;
 9 and
- 10 ● Issue and deliver to Alpha a duly executed stock certificate
 11 evidencing the Shares in Alpha's corporate name.

12 (Compl. ¶¶ 7, 7-80, prayer for relief (c)-(d)). As explained below, this cause of action is riddled with
 13 fatal and incurable defects that require its dismissal.

14 **A. There Is No Recognized Cause Of Action For A Mandatory Injunction**

15 Under California law, it is well settled that a "cause of action for an injunction [i]s improper
 16 as an injunction is a remedy, not a cause of action. " *Roberts v. Los Angeles County Bar Ass'n*, 105
 17 Cal. App. 2d 604, 618 (2003) (citing *McDowell v. Watson*, 59 Cal. App. 4th 1155, 1159 (1997));
 18 *City of South Pasadena v. Detp. of Trans.*, 29 Cal. App. 4th 1280, 1293 (1994) ("Injunctive relief is
 19 a remedy, not a cause of action. "). Because Plaintiff's claim for a Mandatory Injunction is not a
 20 cognizable cause of action under California law, it should be dismissed. Because this defect is not
 21 curable by amendment, the First Cause of Action should be dismissed with prejudice.

22 **B. Regardless, On The Face Of The Complaint, Plaintiff Cannot Seek An**
 23 **Injunction Because It Has An Adequate Remedy At Law**

24 Apart from the fact that a "mandatory injunction" is not a cognizable cause of action in the
 25 first place, it is not even available as a remedy where, as here, "pecuniary compensation would ...
 26 afford adequate relief. " Cal. Civ. Code § 3422. Here, on the face of the Complaint. Plaintiff alleges
 27 that: (1) it was entitled to purchase one million shares of stock at \$12.87 per share (Compl. ¶ 1); (2)
 28 the transaction was wrongfully scuttled; (Compl. ¶ 77); and (3) the "value of the Shares...has

1 increased ... significantly.” (Compl. ¶ 67). Even assuming, *arguendo*, that Plaintiff had a viable
 2 cause of action (which Mr. Trader denies), on the facts Plaintiff alleges in the Complaint, where
 3 calculating monetary damages is simple math and there is no indication of any irreparable injury,
 4 there is simply no legal basis for injunctive relief. *See, e.g.*, Cal. Civ. Proc. Code 526(a)(5)
 5 (injunction cannot be granted to prevent breach of contract, which is not specifically enforceable).

6 **C. Under The Exercise Agreement, Injunctive Relief Would Be Improper Because**
 7 **Plaintiff Has No Contractual Right To Cloud Title To Mr. Traders Shares After**
 8 **The 120-Day Window Closed**

9 Plaintiff’s claim for injunctive relief fails for the additional reason that it would contravene
 10 the terms of the Exercise Agreement to which Plaintiff agreed it was bound. Under the terms of the
 11 Exercise Agreement, to which Plaintiff “acknowledge[d] “ and “agree[d] “ it is bound, the parties
 12 had 120 days to consummate the sale. If the transaction was not consummated within that time
 13 period sale would be extinguished. The Exercise Agreement required that any additional efforts to
 14 consummate the sale would require a new notice, which, in turn, would require a new agreement
 15 from Mr. Trader to re-tender his shares. *See* RJN Ex. D (Exercise Agreement ¶¶ 9.1 and 9.5).

16 The 120-day period during which the contemplated transaction was required to be
 17 consummated began to run on August 26, 2010 and, because no transaction was consummated, the
 18 deal expired on December 24, 2010. Plaintiff does not allege that any new Notice was provided
 19 (under which Zynga would have a new right of first refusal), nor that Mr. Trader agreed to re-tender
 20 his stock. Plaintiff cannot end-run around these contractual restrictions, to which Plaintiff agreed, by
 21 seeing an injunction.

22 ///

23 ///

24 ///

25 ///

26 **IV. CONCLUSION**

27 For each of the foregoing reasons, Defendant Andrew Trader respectfully requests that the
 28

1 Court dismiss Plaintiff's first cause of action for a purported Mandatory Injunction and strike any
2 prayer for injunctive relief as to Mr. Trader's stock.

3 DATED: August 5, 2011

VICK LAW GROUP, APC

4 By: /s/ Scott Vick

5 VICK LAW GROUP, APC

6 Scott Vick (No. 171944)

7 Lital Gilboa (No. 263372)

8 Attorneys for Defendant

9 ANDREW TRADER